

IN THE SUPREME COURT OF THE STATE OF DELAWARE

MARK B. HOWARD,	§	
	§	No. 391, 2008
Defendant Below,	§	
Appellant,	§	Court Below: Superior Court of
	§	the State of Delaware in and for
v.	§	New Castle County
	§	
STATE OF DELAWARE,	§	Cr. I.D. No. 0611014197
	§	
Plaintiff Below,	§	
Appellee.	§	

Submitted: August 12, 2009

Decided: September 22, 2009

Before **STEELE**, Chief Justice, **BERGER** and **JACOBS**, Justices.

ORDER

This 22nd day of September 2009, upon consideration of the briefs of the parties and the record in this case, it appears to the Court that:

1. Mark B. Howard, the defendant-below, appeals from Superior Court final judgments of conviction of Sexual Solicitation of a Child (two counts), Unlawful Sexual Contact, Third Degree Attempted Unlawful Sexual Contact, and First Degree Indecent Exposure (nine counts). On appeal, Howard argues that: (i) his indictment was fatally defective; (ii) the alleged behavior underlying the Sexual Solicitation charges was constitutionally protected free speech; (iii) certain parts of the Sexual Solicitation statute are void for vagueness; and (iv) there was

insufficient evidence to support a conviction on two of the Sexual Solicitation charges. We find no error and affirm.

2. All four claims are inextricably connected to the adequacy and specificity of the indictment. Howard and the State disagree on what conduct Howard was prosecuted for on the Sexual Solicitation charges. Howard contends that he was charged with “soliciting masturbation,” that is, telling someone that masturbation was normal human behavior. The State contends that this case was never about masturbation, but about nudity, physical contact and inappropriate bets. Because Howard failed to raise a pre-trial challenge to his indictment or move for a bill of particulars, he waived his ability to challenge his indictment on appeal, and therefore the State’s characterization of the indictment controls. The State further contends that because Howard was not prosecuted for “soliciting masturbation,” he lacks standing to challenge the Sexual Solicitation statute as an unlawful restriction on the First Amendment’s guarantee of free speech, or as void for vagueness. Finally, the State argues, the evidence of Howard’s inappropriate bets was sufficient to establish sexual solicitation.

3. Howard met Joan Watts through church, and befriended Watts and her two sons, James and Bart Kane (“James” and “Bart” or the “boys”).¹ In late 2005 and early 2006, James (then fourteen years old) began spending considerable time

¹ Because this case involves minor victims of various sexual offenses, the Court, *sua sponte*, has assigned pseudonyms to the parties under Supr. Ct. R. 7(d).

with Howard. The two would frequently go mountain-biking together. After these bike rides, they would return to Howard's condominium in New Castle. Howard would shower after these rides, but James would not shower until he returned home.

4. During the spring of 2006, James' and Howard's relationship became closer. James—and sometimes Bart (then twelve years old)—would stay at Howard's home overnight. Howard told the boys that he wanted to be like a father to them, and encouraged them to call him “dad.” During the course of that spring, Howard promised James that he would pay for him to attend a private high school, pay for his college, and buy him a car. Howard also promised to make James and Bart the beneficiaries of his life insurance policy.

5. What happened during the course of that spring and summer is in dispute. The boys claimed that Howard began engaging in unusual behavior in their presence. James testified that Howard began walking around his apartment in the nude, asked James a series of questions about his sexual preferences, and discussed masturbation with him. Howard admits to telling James—in a father-like way—that masturbation was “okay” and that everyone did it.

6. At some point during that summer, Howard and James began tracking their muscle growth. They measured each other's muscles, and James claims that during one such session, Howard pulled down James' shorts and exposed his

genitals. Howard and James also began giving each other massages after their bike rides, ostensibly to remove lactic acid from their muscles. James claims that on two different occasions Howard pulled down his (James') boxer shorts and rubbed his buttocks. Bart claims that on two occasions Howard gave him massages and proceeded to rub his thighs near his penis.

7. The boys also testified that Howard proposed a series of unusual bets or dares with them, all involving nudity. James claimed that on at least ten occasions, Howard offered him twenty dollars to "moon ride"—that is, pull down his pants and expose his buttocks while riding a bicycle. James testified that Howard once asked him to make a similar bet, and that after he (James) declined, Howard said that he would "moon ride" for free. Howard then proceeded to expose his buttocks and ride his bike. James also claimed that on several occasions Howard offered him money to go out naked on his deck, stand naked in front of a window, or do naked push-ups outside.

8. Finally, both James and Bart testified that on separate occasions Howard offered them twenty dollars to swim naked—wagers that they accepted. The boys also testified that Howard told them that his behavior was part of a normal father-son relationship, but that the boys should not tell anyone, because those persons "might get the wrong idea."

9. On November 17, 2006, Howard was arrested and charged with multiple counts of Sexual Solicitation of a Child, First Degree Indecent Exposure, Second Degree Unlawful Sexual Contact, Endangering the Welfare of a Child, and Third Degree Attempted Unlawful Sexual Contact. Howard was indicted on October 1, 2007, and arraigned on October 12. The indictment set forth the charges against Howard, but there was no “to-wit” clause attached to any of the charges setting forth the specific facts underlying each charge.

10. On February 21, 2008 Howard moved to dismiss all counts of Sexual Solicitation of a Child. Claiming that he was being prosecuted for telling James—in a father-like way—that masturbation was okay, Howard argued that masturbation has two meanings—auto-erotic behavior and manually stimulating another. Because the Sexual Solicitation statute is unclear as to which of the two meanings is intended, the statute is void for vagueness. Howard’s arguments rested on the (incorrect) assumption that the State was prosecuting him, at least in part, on a theory that he had “solicited masturbation.”

11. The State did not respond to Howard’s motion in writing. The pre-trial motion judge heard oral argument on the motion on March 10, 2008. Howard’s counsel argued that the motion was “unique” and “novel” and that “[he] expect[ed] the [c]ourt to deny it out-of-hand, but [he] needed to make a record of it [for appeal].” The prosecutor argued that “there’s nothing constitutionally [vague]

about the term ‘masturbation.’” The Superior Court denied the motion, reasoning that there was no constitutional authority supporting Howard’s arguments.

12. Howard’s case went to trial on June 5, 2008. In its opening argument to the jury, the State mentioned Howard’s discussions of masturbation as background information on Howard’s inappropriate bets:

Mark Howard would talk to James about masturbating, a subject that was very uncomfortable for James to talk about with him. With respect to Bart, there came a time that the defendant offered for look at Bart’s private area for him.... *Next came to light in these [sic] progression of events what James refers to, and Bart, bets.... These bets meant that the defendant would offer James and Bart money to essentially expose themselves to him.* (emphasis added)

In her closing argument, the prosecutor summarized the State’s theory of the case against Howard as follows:

[Of] the five counts of sexual solicitation that you will be considering during your deliberations, three of those counts refer to James Kane, and two of those refer to Bart Kane. The elements are, defendant being a person 18 years or older, did intentionally or knowingly solicit, request, command, importune, or otherwise attempt to cause a child who has not yet reached his 16th birthday to engage in a prohibited sexual act.

* * *

With respect to Bart, there are two instances. The first instance of solicitation the defendant offered Bart \$20 to take his shorts off and swim naked, thereby ... exposing his genitalia ... in a lewd and lascivious manner.

The second instance, according to Bart ... [is] the defendant asked him, if he ever wanted to drop his drawers to see if everything was okay, he would look down there, referring to his penis....

With respect to the counts [of Sexual Solicitation of a Child] involving James it was really all about the bet. The bets are offers for James to expose himself for money. James testified that the defendant would offer him money on a number of occasions to go out on the deck naked, to do pushups on the deck naked, to stand in front of a window naked....

Howard did not object to that characterization of the charges against him.

13. The jury convicted Howard of two counts of Sexual Solicitation of a Child, nine counts of Indecent Exposure, one count of Second Degree Unlawful Sexual Contact, and one count of the lesser included offense of Third Degree Attempted Sexual Contact. Howard was acquitted of the other charges. Howard timely appealed his convictions to this Court.

14. The Superior Court, to reiterate, denied Howard's motion to dismiss the Sexual Solicitation of a Child charges, because "[t]he [c]ourt finds no valid constitutional basis for the motion." On appeal, Howard raises four claims of error: (i) 11 *Del. C.* § 1112A (Sexual Solicitation of a Child), as applied to Howard, violates the free speech guarantee of the First Amendment; (ii) 11 *Del. C.* § 1103(e)(3) (defining "masturbation" as a prohibited sexual act) is void for vagueness; (iii) all counts of Howard's indictment were fatally defective due to lack of specificity; and (iv) there was insufficient evidence to support a conviction

on the Sexual Solicitation of a Child charges.² The State responds that Howard lacks standing to advance his first two arguments, waived his right to challenge the specificity of his indictment, and that the evidence was sufficient to support a conviction on Sexual Solicitation of a Child.

15. Three issues are presented. First, was Howard's indictment fatally defective for a lack of specificity on the Sexual Solicitation of a Child charges? Second, was Howard charged with "soliciting masturbation?" If so, he has standing to challenge the constitutionality of 11 *Del. C.* §§ 1103(e)(3) and 1112A. Third, was there sufficient evidence to support a conviction on the Sexual Solicitation of a Child charges?

16. Because Howard did not challenge his indictment pre-trial, the Superior Court did not address the indictment's specificity. Howard argues, nonetheless, that he cannot determine from the face of the indictment what specific conduct he was actually prosecuted for.³ That lack of specificity, he argues, means that he was in danger of facing subsequent prosecution for the same conduct in violation of the Double Jeopardy Clause. If clear and specific, the indictment could be interposed as a bar in a subsequent prosecution for the same conduct, but the indictment here

² In his briefs Howard claims that it was plain error for the Superior Court to fail to give, *sua sponte*, a single theory unanimity jury instruction on the Sexual Solicitation charges. At oral argument, Howard's counsel withdrew that argument, and we do not consider it.

³ The State introduced evidence of a plethora of "bad acts" but only prosecuted Howard on some of them. The uncharged acts were introduced as background information for the jury.

offers no such protection. The State responds that Howard waived any issues relating to the specificity of his indictment by failing to challenge the indictment pre-trial.

17. We conclude that Howard waived his right to challenge the specificity of his indictment. Superior Court Criminal Rule 12(b)(2) provides that “[d]efenses and objections based on defects in the indictment or information [must be raised pre-trial].” As this Court has held, “any objections to the form of an indictment are waived unless they are made prior to trial.”⁴ Howard argues, nonetheless, that he is entitled to plain error review to avoid prejudice to his substantial Double Jeopardy rights. In *Malloy v. State*,⁵ this Court described the purpose of indictments as: (i) giving the defendant full notice of what he is being called upon to defend; and (ii) precluding a subsequent prosecution for the same offense.⁶ The *Malloy* Court noted that those “purposes are fulfilled if the indictment ... contains a plain statement of the elements or essential facts of the crime.”⁷ Because a delay

⁴ *Malin v. State*, 954 A.2d 910 (Table), 2008 WL 2429114, at *2 (Del. Supr., June 17, 2008).

⁵ 462 A.2d 1088 (Del. 1983).

⁶ *Id.* at 1092.

⁷ *Id.* Unlike the Delaware Rules, Federal Rule of Criminal Procedure 12(b)(2) allows a challenge to the specificity of an indictment pre-trial, and Rule 12(b)(5) does not require a pre-trial challenge. Where an indictment is not challenged until after trial, the federal courts construe the indictment liberally in favor of sufficiency. That standard, in effect, approximates the Delaware standard, because an indictment that can reasonably be interpreted to charge a crime is sufficient. See *United States v. Hart*, 640 F.2d 856, 857-58 (6th Cir. 1981) (“if [the indictment]

in challenging an indictment suggests a tactical motive to manufacture grounds for appeal, we held that a waived challenge to an indictment is reviewed *only* “if the indictment cannot, by the most liberal construction be said to have imparted notice....”⁸ Howard’s indictment recited the elements of the criminal statutes he was charged with violating. It therefore provided him with sufficient notice. The inquiry can end there. If Howard was uncertain of what specific conduct he was being prosecuted for, it was his burden to move for a bill of particulars.

18. Howard’s claim that he faces substantial prejudice in the form of a Double Jeopardy violation is unfounded. Howard was charged with five counts of Sexual Solicitation, but the State introduced evidence of ten. The indictment and trial record together establish what Howard was being prosecuted for, and are sufficient to bar subsequent prosecution for the same offenses.

19. Howard’s second claim is twofold: the Sexual Solicitation statute⁹ is constitutionally infirm to the extent it restricts protected speech (here, fatherly advice that “masturbation is okay”), and is void for vagueness because masturbation has two meanings—manual sexual stimulation of either oneself or another person. The Superior Court denied Howard’s pre-trial motion to dismiss

can reasonably be construed to charge the crime of which [defendant] was convicted, we conclude that the sufficiency of this indictment must be upheld.”)

⁸ *Id.*

⁹ 11 *Del. C.* §§ 1103(e)(3) (definition of prohibited sexual act) and 1112A (Sexual Solicitation of a Child).

on grounds of constitutional infirmity and statutory vagueness, but did not explain its ruling. The State argues that this case had nothing to do with masturbation. Because Howard was not charged or prosecuted for “soliciting masturbation,” he lacks standing to challenge the Sexual Solicitation Statute. As the prosecutor explained, the Sexual Solicitation charges were based on Howard’s inappropriate “nudity bets.” Howard’s argument that he was prosecuted for “soliciting masturbation,” requires that we credit his idiosyncratic interpretation of his indictment. Because Howard did not challenge his indictment pre-trial, the State’s theory of the case—as explained by the prosecutor at trial—controls. Howard was not prosecuted for “soliciting masturbation,” and therefore lacks standing to challenge the Sexual Solicitation statute on that basis.

20. The final issue is whether there was sufficient evidence to convict Howard of Sexual Solicitation of a Child. Normally, where a defendant challenges the sufficiency of the evidence by appealing the denial of a motion of a judgment of acquittal, we exercise *de novo* review and view the evidence in the light most favorable to the prosecution.¹⁰ Here, because Howard did not move for a judgment of acquittal, the standard of review is plain error. Howard’s argument rests on the premise that he was convicted for telling the boys that masturbation was normal and that those words alone could not establish that he attempted to solicit a

¹⁰ *White v. State*, 906 A.2d 82, 85 (Del. 2006).

prohibited sexual act. This argument fails because Howard was not convicted of Sexual Solicitation for discussing masturbation with the boys, but rather, for making inappropriate bets involving nudity. The boys' testimony that Howard made those bets with them was sufficient to convict on those charges.

NOW, THEREFORE, IT IS ORDERED that the judgments of the Superior Court are **AFFIRMED**.

BY THE COURT:

/s/ Jack B. Jacobs
Justice